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IN THE

UNITED STATES SUPREME COURT

October Term, 1986

NEW MEXICO TAXATION AND
REVENUE DEPARTMENT,

Petitioner,

V.

RAMAH NAVAJO SCHOOL BOARD, INC.

AND

LEMBKE CONSTRUCTION COMPANY, INC.

Respondents.

ON CERTIORARI TO
THE COURT OF APPEALS OF NEW MEXICO

RESPONDENT RAMAH NAVAJO SCHOOL BOARD INC.'S BRIEF IN RESPONSE TO AMICI CURIAE

MICHAEL PAUL GROSS
ROTH, VAN AMBERG, GROSS,
AMARANT & ROGERS
347 East Palace Avenue
Post Office Box 1447
Santa Fe, New Mexico 87504
(505) 988-8979

Counsel for Respondent

October 1986

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BRIEF IN RESPONSE TO AMICI CURIAE

THE QUESTION POSED BY AMICI CURIAE HAS BEEN SETTLED AND RELIEF, IF ANY IS NECESSARY, MUST COME FROM CONGRESS.

Amici Curiae, a group of seventeen States, want this Court to review the New Mexico Court of Appeals' decision in this case on grounds that 42 U.S.C. §1983 and §1988 do not extend to tax cases. They reason that a line of cases not involving Section 1983 but dealing with its federal court jurisdictional counterpart, 28 U.S.C. §1343(3), implies acceptance by this Court of the proposition that Section 1983 does not include tax cases.

Yet in addition to Fair Assessment in Real Estate Association v. McNary, 454 U.S. 100 (1981), which Amici Curiae concede contains language contrary to their argument, there is significant additional case law to the same effect. Recently, for example, the Tenth Circuit Court of Appeals decided Brooks v. Nance, ____ F.2d ____,

No. 84-2495, Slip Opinion September 26, 1986. Brooks involved an action seeking damages, injunctive relief and declaratory relief in federal court under 42 U.S.C. §1983. Two individual Indian brothers sought to contest application of Oklahoma's cigarette tax on them and retrieve back their goods which had been seized by Oklahoma authorities.

Just as this Court did in McNary, the Tenth Circuit upheld a lower court's decision based on the principle of comity that a suit brought under 42 U.S.C. §1983 involving a challenge to imposition of State tax laws is barred from federal courts. Relying on McNary, the Tenth Circuit applied the Tax Injunction Act, 28 U.S.C. §1341, and the principle of comity holding that a plain, speedy and efficient remedy existed in State court, thus barring litigation of the tax's validity under Section 1983 in federal court:

> As taxpayers, the Brooks brothers may apply for a hearing before the Tax Commission to challenge any incorrect assessment of taxes. Okla. Stat. Ann. tit. 68, §207(c) (West 1966). They have the option of appealing the Tax Commission's decision directly to the Supreme Court of Oklahoma, id. at §225 (West Supp. 1985), or paying the disputed tax and instituting an action in any state court having jurisdiction over the parties and subject matter, id. at §226. They may also apply for injunctive and declaratory relief in the Oklahoma state courts. Okla. Stat. Ann. tit. 12, §§1397, 1651-1657 (West 1980). Moreover, section 1983 claims may be brought in the state court system. See, e.g., Willbourn v. City of Tulsa, 721 P.2d 803 (Okl. 1986) (section 1983 available in state court even though state remedy time barred). (emphasis added)

Slip Opinion, supra, at 6-7.

The instant case arose in state court and Respondent Ramah Navajo School Board, Inc. exhausted state remedies. Ramah Navajo School Board, Inc. v. Bureau of Revenue, 458 U.S. 832, at 836 (1982). No issue of comity or of the Tax Injunction Act (or for that matter the Eleventh Amendment) therefore exists in this case. The question amici curiae attempt to posit

is thus not present for two reasons. This case does not concern federal court jurisdiction and this Court has already determined that 42 U.S.C. §1983 applies to tax cases brought in State courts.

The point is made even clearer by examination of the concurring opinion in McNary. Four members of this Court, Justices Brennan, Marshall, Stevens and O'Connor, joined the other five members in the judgment rendered but rejected the majority's reasoning. In the minds of the four, the decision to uphold the lower court's rejection of the taxpayers' action in federal court should have rested on failure to exhaust administrative remedies rather than comity. In the course of explaining this view, Justice Brennan made statements throughout clearly premised on the assumption that 42 U.S.C. §1983 is available to test tax actions by States in violation of the Constitution or laws of

the United States (the wording of Section 1983) in the same manner as it does to any other kind of action. Thus,

> The opinion for the Court sets the "principle of comity" against the strong policies of 42 U.S.C. §1983 favoring a federal forum to vindicate deprivations of federal rights, and resolves the issue in favor of comity. In my view, there is no conflict here that could conceivably justify the unprecedented step of renouncing our assigned jurisdiction.

Id. at 454 U.S., 119. (emphasis added)

> The conclusion is thus inescapable that Congress did not intend to bar actions such as this one from the federal courts. On the contrary, Congress clearly intended that the federal forum would continue to remain available in state tax cases for monetary relief despite passage of the Tax Injunction Act. (emphasis in original)

Id., at 454 U.S., 132. And,

> As noted above, in enacting the Tax Injunction Act, Congress sought to assure that the federal courts would remain open to suits for monetary relief in state tax cases, "if the requisite elements of federal jurisdiction existed."

Id., at 454 U.S., 136-7.

Significantly, the majority in McNary

agreed that Congress intended to include tax actions in the sweep of Section 1983. Thus,

> The adequacy of available Missouri remedies is not at issue in this case. The District Court expressly found "that [petitioners] have means to rectify what they consider an unjust situation through the state's own processes," 478 F.Supp., at 1234, and petitioners do not contest this finding. In addition, the Missouri Supreme Court has expressly held that plaintiffs such as petitioners may assert a §1983 claim in state court. See, e.g., Stafford v. Muster, 582 S.W.2d 670, 681 (1979); Shapiro v. Columbia Union National Bank & Trust Co., 576 S.W. 2d 310 (1978). (emphasis added)

454 U.S., at 116-117.

This language accords entirely with the recent Tenth Circuit ruling in Brooks v. Nance, supra,[1] and demonstrates conclu-

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[1] It is of interest that one of the Amici States, Oklahoma, was represented in Brooks by the Attorney General of Oklahoma whose name also appears on the brief of amici curiae in the instant matter. The decision in Brooks, however, fails to mention the novel proposition that 42 U.S.C. §1983 does not apply to tax cases, an omission suggesting that at least in the Brooks case, the State of Oklahoma chose not to make that argument.

sively that so far as state and federal courts including all nine members of this Court are concerned there is no question but that 42 U.S.C. §1983 actions may be brought in state courts to challenge state tax actions.

Amici Curiae have thus conjured up a non-existing legal issue in an effort to challenge a legislative choice of the Congress. Such policy issues should be directed to Congress and not this Court.

Finally in the absence of any indications that the White Mountain Apache Tribe[2] line of cases will result in a flood of applications for attorney's fees under 42 U.S.C. §1988, it is premature to ask this Court to review this question.

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[2] White Mountain Apache Tribe v. Bracker, 448 U.S. 136 (1980); Central Machinery Co. v. Arizona Tax Comm'n, 448 U.S. 160 (1980); and Ramah Navajo School Board v. Bureau of Revenue, 458 U.S. 832 (1982).

CONCLUSION

For these reasons, the Petition for Certiorari should be denied.

Respectfully submitted:

MICHAEL PAUL GROSS
Roth, Van Amberg, Gross,
Amarant & Rogers
347 East Palace Avenue
Post Office Box 1447
Santa Fe, New Mexico 87504-1447
(505) 988-8979

Counsel for Respondent
Ramah Navajo School Board, Inc.